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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

8962

FILE: B-192318

DATE: January 25, 1979

MATTER OF: Dictaphone Corporation

DIGEST:

1. Where vendor under FSS contract apprises procuring activity shortly before award that it offers "middle of the line" equipment and procuring activity only has specifications for vendor's "top of the line" equipment, procuring activity, in attempt to reduce procurement costs, should have attempted to obtain specifications from vendor or GSA and determine if "middle of the line" equipment would satisfy Government's legitimate needs. However, since vendor should have advised agency of middle of line equipment earlier in procurement process and offered equipment met agency's minimum needs and has been delivered and installed, award will not be disturbed.
2. FPR provides that Buy American Act differential of 12 percent be applied to price of foreign-origin products where concern submitting low domestic bid or offer will substantially perform contract in labor surplus area. A 12-percent Buy American Act differential should not be applied where vendor under FSS contract produced equipment in labor surplus area facility but facility was closed before purchase order was issued for equipment because regulations contemplate contract performance in labor surplus area after issuance of purchase orders so as to help achieve regulatory objective of fostering employment in such area.
3. Purchase of least costly dictating and transcribing systems which satisfied legitimate need of various field offices, as determined by agency, was proper procurement practice.

CNG 01046

This protest by ~~Dictaphone Corporation~~ (Dictaphone) involves the procurement of dictating and transcribing equipment (D/T equipment) by the Federal Bureau of

AGC 00102

003578

Decision

Investigation (FBI) for five FBI field offices, namely, Baltimore, Milwaukee, Newark, San Diego, and Washington, D.C.

The FBI made a detailed evaluation of the D/T equipment offered by each vendor under General Services Administration's (GSA) Federal Supply Schedule (FSS) *AGC 00043* contracts to determine which vendor offered D/T equipment which would satisfy the FBI legitimate needs. As a result of this analysis, the FBI determined that only Dictaphone and Lanier Business Products and Oxford Industry (Lanier) *DLG 00738* offered acceptable products. In evaluating the cost of the D/T equipment, the FBI added a 6-percent Buy American Act differential to the prices offered by Lanier.

A schedule of the offered prices, less discount and trade-in, follows:

Field Offices	Dictaphone	Lanier
Baltimore	\$24,476.34	\$23,248.12
Milwaukee	14,864.82	13,406.05
Newark	36,101.50	41,874.90
San Diego	12,742.34	10,591.20
Washington	31,407.51*	30,735.97

The FBI purchased D/T equipment for the Baltimore, Milwaukee, San Diego, and Washington field offices from Lanier. The D/T equipment for the Newark field office was purchased from Dictaphone. We have been advised that the vendors have delivered and installed the equipment.

Dictaphone protests in substance as follows:

1. Dictaphone's "top of the line" model 260 equipment was compared to Lanier's "middle of the line" Regent model equipment. The FBI failed to evaluate Dictaphone's model 255 equipment, which is less costly than model 260 equipment and is comparable to the Lanier Regent equipment, even though the FBI had information concerning model 255 equipment before award.

* Does not include price of three Dictaphone central recorders.

2. Lanier offered equipment which lacked certain essential features such as voice-operated relays (VOR), buffered storage VOR, or audio time delays.

3. Dictaphone made an offer and in July 1977 was awarded an FSS contract. Dictaphone proceeded to manufacture the D/T equipment here involved at a facility located in a labor surplus area until the facility was closed in November 1977. Therefore, a 12-percent instead of a 6-percent Buy American Act differential should have been applied to the prices of Lanier's equipment since Dictaphone's equipment was manufactured under Government contract in a labor surplus area. Entitlement to Buy American Act preferences is determined at the time a vendor submits an offer for an FSS contract and not at the time purchase orders are issued under such contract. See section 1-6.104.4 (1964 ed. circ. 1) of the Federal Procurement Regulations (FPR). If vendors were required to produce products in a labor surplus area after the issuance of a purchase order under an FSS contract, virtually every vendor in a labor surplus area would not be entitled to a Buy American Act preference because the products could not be manufactured in time to meet the short delivery schedule of FSS contracts. Besides, purchase orders are not contracts which must be performed in a labor surplus area in order to qualify for a 12-percent Buy American Act differential.

4. Dictaphone was asked to offer prices for three central recorders for the Washington Field Office (WFO), which Lanier did not have to offer since three Lanier central recorders were already installed at WFO. This placed Dictaphone at a competitive disadvantage; moreover, Dictaphone should not have been asked to quote these prices and the prices should not have been included in the cost comparison since Dictaphone equipment is compatible with Lanier recorders already installed at WFO.

5. If a 12-percent Buy American Act differential had been properly applied to Lanier's offered prices and the three Dictaphone central recorders were excluded from the calculations, Dictaphone's total offer for the five FBI field offices would be low.

In response to Dictaphone's protest, the FBI states that Dictaphone and Lanier were contacted on June 22, 1978. Both vendors were apprised of FBI equipment needs and existing FBI equipment available for trade-in. Dictaphone and Lanier were requested to submit only trade-in allowances by June 28, 1978. They were further advised that award would be made prior to June 30, 1978.

The FBI states further that the FSS contracts involved were due to expire on June 30, 1978. A sharp price increase was anticipated, and the FBI field offices were urgently in need of the D/T equipment.

The FBI goes on to assert that Dictaphone made a timely submittal setting forth trade-in allowances; however, it made no mention of its model 255 equipment. On June 28, 1978, Dictaphone orally provided information concerning such equipment but the information was incomplete. Although Dictaphone's GSA contract was amended on May 13, 1978, to include model 255, the FBI had no record of ever having received the amendment concerning model 255 equipment. Approximately 3 weeks before award, Dictaphone demonstrated its equipment and provided clarifying information to FBI representatives, but it made no mention of its model 255 equipment.

According to the FBI, Lanier and other vendors were not expected to offer equipment with certain features. Vendors were advised that the equipment which satisfied the FBI's legitimate needs would be procured under FSS contracts.

With regard to the Buy American Act differential, the FBI states that applicable regulations provide that the 12-percent differential requested by Dictaphone is applied only where the low domestic offeror will substantially perform the contract in a labor surplus area. A 6-percent Buy American Act differential was applied to Lanier's offered prices because Dictaphone was not manufacturing model 260 D/T equipment in a labor surplus area at the time the purchase orders were issued. Consequently, Dictaphone would not sub-

stantially perform the contract in a labor surplus area. See FPR §§ 1-1.801(c) (1964 ed. amend. 192), 1-1.802-1 (1964 ed. amend. 192), 1-6.104.4 (1964 ed. circ. 1). In this regard, the FBI states that purchase orders issued under an FSS contract are contracts which must be substantially performed in a labor surplus area if a 12-percent Buy American Act differential is to be applied to the prices of foreign origin products. See FPR § 1-1.208 (1964 ed. amend. 9).

The FBI also contends that the WFO utilizes three Lanier central recorders. The Lanier recorders are not compatible with Dictaphone equipment. Therefore, three Dictaphone central recorders were considered in the evaluation of equipment for WFO. If Dictaphone had offered the low cost system for WFO, WFO's central recorders would have been transferred to an office utilizing compatible Lanier equipment.

~~The FBI contends that it did not receive complete data concerning Dictaphone's model 255 equipment in time for it to be evaluated.~~ The record shows that shortly before award the FBI was aware that Dictaphone offered model 255 equipment. Under the circumstances, we think that the FBI should have attempted to obtain information from Dictaphone or GSA concerning the features and capabilities of the model 255 equipment so that a determination could be made as to whether the equipment would satisfy the FBI's legitimate needs at any of the five field offices. However, since the vendor should have advised the agency of its middle of the line equipment earlier in the procurement process and the offered equipment met the agency's minimum needs and has been delivered and installed, the award will not be disturbed.

There is no merit to Dictaphone's assertion that the Lanier D/T equipment lacked certain essential features or components, such as VOR, buffered storage VOR, or audio time delays, as the FBI determined from Lanier's descriptive literature that its equipment met its needs.

We agree with the FBI concerning the application of a 6-percent Buy American Act differential to the prices offered by Lanier. To be more specific, the applicable provisions of the FPR provide as follows:

"1-6.104-4 Evaluation of bids and proposals.

* * * * *

"(b) * * * Each foreign bid shall be adjusted for purposes of evaluation by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid, except that a 12 percent factor shall be used instead of a 6 percent factor if the firm submitting the low acceptable domestic bid is a * * * labor surplus area concern (as defined in * * * 1-.801 * * *"

"§ 1-1.801 Definitions.

* * * * *

"(c) The term 'labor surplus area concern' means a concern that together with its first-tier subcontractors will perform substantially in a labor surplus area.

"(d) The term 'perform substantially in labor surplus areas' means that the costs incurred on account of manufacturing, production, or appropriate services in labor surplus areas exceeded 50 percent of the contract price.

"§ 1-1.802 Labor surplus area policies.

"§ 1-1.802-1 General policy.

It is the policy of the Government to award appropriate contracts and grants to, and to execute agreements with, eligible labor surplus area concerns and to encourage prime contractors to place subcontracts with concerns which will perform substantially in labor surplus areas."
(Emphasis added.)

In our opinion, the applicable regulations make it clear that in order for a 12-percent Buy American Act differential to be applied to a foreign offer or bid, the low domestic offeror or bidder must be willing and able to perform the contract substantially in a labor surplus area. The obvious objective of these regulatory provisions is to foster employment in such areas.

As indicated above, Dictaphone was awarded a GSA FSS contract in July 1977. After award, Dictaphone proceeded to manufacture the D/T equipment here involved at a facility located in a labor surplus area until that facility was closed in November 1977, or before the FBI issued purchase orders for D/T equipment. We view each FBI purchase order as a contract because it is by issuance of purchase orders that an FSS contract becomes effective. FPR § 1-1.208 (1964 ed. amend. 9). It follows then that the FBI procurement of Dictaphone D/T equipment would not help relieve unemployment in a labor surplus area, because Dictaphone's facility in a labor surplus area has been closed. Therefore, we do not agree with Dictaphone that the critical date for determining applicability of the Buy American differential is the date of award of the FSS contract. Consequently, Dictaphone is not entitled to have a 12-percent Buy American Act differential applied to the price of Lanier's foreign-origin D/T equipment since the application of the differential would not have its required impact on unemployment in a labor surplus area.

The requirement that each purchase order will be substantially performed in a labor surplus area before a 12-percent Buy American Act differential will be applied to the price of foreign-origin end products does not bar a vendor in a labor surplus area from providing products from inventory, since there is a reasonable presumption that the stock drawn from inventory will be replenished. The replenishment of inventory stock will create a demand for services and material and, thereby, accomplish the regulatory objective of helping to relieve unemployment in a labor surplus area. Therefore, we do not agree with Dictaphone's argument that the Buy American preference cannot relate to the date of the purchase order because the products could not be manufactured in time to meet the short delivery schedule of FSS contracts.

Finally, it was proper for the FBI to purchase the lowest-priced D/T system for each of its field offices which satisfied its legitimate needs. Cf. Lanier Business Products, Inc.; Mid-Atlantic Industries, Inc., B-187819, August 24, 1977, 77-2 CPD 143. Moreover, even if the price of three Dictaphone central recorders were deducted from Dictaphone's offered price for the WFO, Lanier's offered price for the WFO would still be low. See schedule of offered prices, supra.

Based on the foregoing, the protest is denied.


Deputy Comptroller General
of the United States